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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.04.2006

Coram :

THE HONOURABLE MR.JUSTICE R.BALASUBRAMANIAN
AND
THE HONOURABLE MR.JUSTICE P.P.S.JANARTHANA RAJA

Tax Case (Reference) Nos.31 & 32 of 2001

The Commissioner of Income Tax,
T.Nadu-I, Madras. ...Applicant

Vs

1. V.Pradeep Kumar
2. V.Praveen Kumar ...Respondents

Reference under Section 256(1) of the Income Tax Act, 1961 by Income Tax Appellate Tribunal, Madras, 'A' Bench in I.T.A. Nos.244/Mds/91 and 245/Mds/91 for the assessment year 1986-87 against the order of the Commissioner of Income Tax (Appeals) V Madras 600 034 dated 4.12.90/TA 50/90-91 against the order of the Income Tax Officer city ward III (4) Madras 6, dated 30.3.90 GI/PAN.No. 47-067-PZ-7435/4812P/111(4) and 4814-P/86-87/47-069-PZ-7935.

For Applicant : Mrs.Pushya Sitaraman

For Respondents : Mr.R.Venkataraman,
Senior Counsel for
Mr.J. Balachander

JUDGMENT

P.P.S.JANARTHANA RAJA, J.

The Income Tax Appellate Tribunal, Madras, 'A' Bench, referred the following question of law at the instance of Revenue, under the direction of this Court in TCP Nos.77 & 78 of 1998 dated 29.07.1998, for opinion of this Court,:

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"Whether on the facts and in the circumstances of the case, the Appellate Tribunal had valid materials to give a finding that the assessee had constructed a residential house before 21.06.1988 and thus eligible for exemption under sec.54F of the Income Tax Act?"

2. The facts leading to the above question of law are as under:

The relevant assessment year is 1986-87. The assessees are individuals, assessed by the Income Tax Officer, City Ward III(4) on 22.06.1985. They sold a house property at No.40, Moore Street, Madras-1, which was jointly owned by them and each claimed exemption under Section 54F in respect of 50% share of capital gain of Rs.8,25,957/- in the original returns which were filed on 12.09.1986 declaring their intention to construct a residential house within the specified period of three years i.e., before 21.06.1988. The assessments were completed under Section 143(1)(a). Later on, they filed revised returns admitting taxable capital gains of Rs.1,63,487/-, each claiming partial exemption under Section 54F for the reason that they invested the capital gains in the new residential houses to an extent of Rs.7,65,470/- only. The assessments were reopened under Section 148 in both cases and reassessments were completed on 30.03.1990, under Section 143(3) read with Section 147, taxing the entire capital gains of Rs.8,25,957/- on the basis of the materials collected by the Assessing Officer. Aggrieved by the order of the Assessing Officer, the assessees filed appeals before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) dismissed the appeals and confirmed the order of the Assessing Officer. Aggrieved by the same, the assessees filed appeals to the Income Tax Appellate Tribunal. The Tribunal allowed the appeals filed by the assessees and granted exemption under Section 54F.

3. The learned Standing Counsel appearing for the Revenue submitted that there were no new construction of residential houses by the assessees. It is also brought to notice that there was an enquiry made by the Assessing Officer with the Madras Corporation and found that the assessees applied for approval of the plan for construction on 27.12.1989. Further the order of approval for the construction was granted on 09.02.1990. Further the assessee applied for approval for demolishing the above building on 27.12.1989 and the same was granted only on 09.02.1990. Enquiry made by the Departmental Inspector as well as the local enquiry, revealed that there was only an old building

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and no new construction was built at all. Hence there were no new construction by the assessees. Therefore the assessees are not entitled to exemption under Section 54F of the Act.

4. The learned Counsel appearing for the assessees submitted that there were new construction by both the assessees but they were unauthorised construction and the same were demolished later. Further it was submitted that the buildings were constructed and plan was also made. Subsequently, they were demolished for the purpose of modernisation. Since the buildings were constructed and substantial amount of money was spent, the Revenue was not justified in bringing the whole amount of capital gain tax. Further it was contended that the Tribunal had given a factual finding that there were construction of new buildings and hence this Court should not interfere with the factual finding of the Tribunal under reference. It is also emphasised that Section 54F is a beneficial provision and hence the Court should construe the said provision liberally.

5. We heard the arguments of both the sides.

Certain dates are very much important for this case, which are as below:

	V.Pradeep Kumar	V.Praveen Kumar
1) Date of sale of property in Moore Street (Purchase & construction to be completed before 22.6.1988)	22.6.1985	22.6.1985
2) Date of purchase of property at Giri Road	9.3.1988	6.4.1988
3) Date of construction of two individual property started from	15.4.1988	15.4.1988
4) Date of payment made to Contractor	10.6.1988 & 20.6.1988	10.6.1988 & 20.6.1988
5) Date of completion of construction by Contractor	20.6.1988	20.6.1988
6) Date of inspection by the valuer to the two separate buiding	29.6.1988	29.6.1988
7) Date of cost of construction and valuation report	30.6.1988	30.6.1988

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Section 54F deals with capital gain on transfer of certain capital assets not to be charged in case of investment in residential house. The section reads as follows:

> S.54F. Capital gain on transfer of certain capital assets not to be charged in case of investment in residential house.-(1) [Subject to the provisions of sub-section (4), where, in the case of an assessee being an individual or a Hindu undivided family], the capital gain arises from the transfer of any long-term capital asset, not being a residential house (hereafter in this section referred to as the original asset), and the assessee has, within a period of one year before or [two years] after the date on which the transfer took place purchased, or has within a period of three years after that date constructed, a residential house (hereafter in this section referred to as the new asset), the capital gain shall be dealt with in accordance with the following provisions of this section, that is to say,-
>
> (a) if the cost of the new asset is not less than the net consideration in respect of the original asset, the whole of such capital gain shall not be charged under section 45;
>
> (b) if the cost of the new asset is less than the net consideration in respect of the original asset, so much of the capital gain as bears to the whole of the capital gain the same proportion as the cost of the new asset bears to the net consideration, shall not be charged under section 45:
>
> Provided that nothing contained in this sub-section shall apply where the assessee owns on the date of the transfer of the original asset, or purchases, within the period of one year after such date, or constructs, within the period of three years after such date, any residential house, the income from which is chargeable under the head "Income from house property", other than the new asset."

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The above section was inserted by the Finance Act of 1982 with effect from 1st March 1983. The conditions precedent for getting exemption are:

1. Transfer of any long term capital assets not being a residential house.

2. The assessee purchases within a period of one year before or two years after the date on which the transfer took place or construct within a period of three years after the date of transfer, any residential house.

From a reading of the above, what we have to see in this case is whether the assessees had constructed residential houses within a period of three years after the date of transfer or not. From the above tabular column, it is clear that the date of sale of property was on 22.06.1985 and the date of purchase of property was on 09.03.1988 in the case of Sri.V.Pradeep Kumar in Tax Case No.31 of 2001 and 06.04.1988 in the case of Sri.V.Praveen Kumar in Tax Case No.32 of 2001. The assessees stated that they commenced the construction of new residential houses from 15.04.1988 and completed the construction on 20.06.1988. The due date for completing the construction was on 20.06.1988. The findings given by the Tribunal for each construction of new houses are as below:

> "Actually the assessees applied to the Corporation of Madras vide their letter dated 23-12-89. Along with this letter, they enclosed photostat copy of the sale deed, copy of property transfer issued by the Corporation, seven copies of the demolition plan, seven copies of construction plan and indemnity bond and affidavit. In one blue print, the plan of the proposed new construction of 5085 sq.ft. was exhibited. The said building was proposed to be constructed in ground floor as well as first floor. In this plan, the Architect Savitha Chowdhry put the date as 4-12-1989. In another blue print the building to be demolished was shown. The total area to be demolished was shown at 1852 sq.ft. In the said blue print, the Architect Savitha Chowdhry put the date as 17-10-89. In the said blue print for which demolition was applied for, the old building as it existed as per the sale deed dated 9-3-88 was shown.

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> The actual claim of these assessees is that Shri Pradeep Kumar had undertaken some new construction by way of extension to the old existing building both in the ground floor and in the first floor. This can be seen at pages 71 and 71A in coloured portion in paper book No.1 filed by Shri Pradeep Kumar. Shri Praveen Kumar claimed to have constructed a small building of 382 sq.ft. by demolishing the old existing A.C.C. Roofed outhouse of 324 sq.ft. described in the sale deed dated 6-4-88. They further claimed that they were unauthorised constructions / extensions and that there were no applications for approval to the Corporation of Madras and that they were later pulled down to enable them to go in for an approval and authorised construction."

We have gone through all the materials available on record and we find that there was an inspection on 14.02.1990 by the Assessing Officer and contemporary photographs of the existing buildings were taken on 16.02.1990 and in consequence of the above, the Revenue rightly established that there were not in existence of any such constructed house properties, instead the old building from which the doors and windows have been removed as could be seen from the photographs which are in possession of the Department. It is clear from the contemporaneous evidence available on record that there were no new residential houses exhibited on the plot in question. Further, we have also seen that the assessees got approval from the Corporation of Madras only on 09.02.1990 for demolishing the old existing building at the said plot, and the completion of the full demolition has been carried out by the assessee only at the end of March 1990. This evidence clearly go to prove that the existing old building which was purchased, was completely demolished in March 1990 only. The burden is on the assessees to prove that they had actually constructed new residential houses for purpose of the exemption under Section 54F of the Income Tax Act. It is stated by the counsel for the assessees, that the assessees had constructed new residential houses, but they were unauthorised construction and the same unauthorised construction were later demolished for purpose of modernisation. In this case, there is no tangible material to even infer that a residential house was constructed. One of the assessees say there was an extension to an existing structure and the other says the out-house was demolished; a new construction was put up in its place and both being unauthorised, have been pulled down on their own voluntarily. Section 54F emphasises construction of residential house. The said construction must be real one. It should not be a symbolic

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construction. Further it is seen from the finding of the Tribunal that the assessee Sri.Pradeep Kumar had undertaken an extension work in the old building in the ground floor and first floor. From the above finding it is clear that there is no residential house and it is only an extension of the old building. A mere extension of the existing building will not give benefit to the assessee as contemplated under Section 54F of the Act. In the case of Sri.Praveen Kumar, it was stated by the Tribunal that he had constructed a small building measuring 382sq.ft. by demolishing the existing A.C.C. roofed outhouse of 324 sq.ft. We have already noted that there is no acceptable proof for such construction. Mere construction by way of extension of the old existing house would not mean constructing a residential house as contemplated under Section 54F of the Act. The argument of the counsel for the assessees about the construction of residential houses is not based on any valid material and is not entitled to the benefit of Section 54F of the Act. Also, there is no evidence or contemporaneous documents available to show that there were construction. In our opinion, the assessees failed to satisfy the conditions contemplated under Section 54F of the Act. The other argument of the counsel is that, when the Tribunal had come to a conclusion based on evidence, this Court normally will not interfere under reference. In this case, the finding of the Tribunal was based on no material and evidence. The Tribunal had considered only irrelevant materials and the order of the Tribunal is a perverse one. In such circumstance, the Court can interfere under reference. The Supreme Court judgments reported in 87 ITR 370 in the case of C.I.T. Vs. S.P.Jain and 37 ITR 151 in the case of Omar Salay Mohamed Sait Vs. C.I.T., held that the High Court has undoubted jurisdiction to interfere with the findings of the Tribunal if it appears that either the Tribunal has arrived at a finding based on no evidence or its finding is inconsistent with the evidence on record or it has acted on material partly relevant and partly irrelevant or it draws upon its own imagination and imports facts and circumstances not apparent from the record or it bases its conclusion on mere conjectures or surmises or no person judicially acting or properly instructed as to the relevant law could have come to the determination reached by the Tribunal. This Court, in the case of C.I.T. Vs. Coromandel Indag Products Limited, reported in 265 ITR 611, considered the scope of reference under Section 256 of the Act and held as follows:

> "As far as the decisions of the Supreme Court in Badal Ram Laxmi Narain v. CIT [1991] 191 ITR 296 and CIT v. Cellulose Products of India Ltd. [1991] 192 ITR 155 are concerned, it is axiomatic that the High Court should not interfere with the Tribunal's finding of fact even if another view is possible. The Supreme

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> Court has also held that the High Court hearing a reference under the Income Tax Act does not exercise appellate or revisional or supervisory jurisdiction over the Appellate Tribunal and that it acts in a purely and advisory capacity. We are of the view that if the Tribunal, after considering the evidences produced before it on a question of fact, records the finding, this Court will not interfere with such finding unless the said finding is not supported by any evidence or is perverse or patently unreasonable."

In the present case, the finding of the Tribunal is not based on any evidence. The order of the Tribunal is perverse and it is patently erroneous and unreasonable, because it has overlooked the materials produced by the Assessing Officer and in the absence of any material, the Tribunal had come to an erroneous conclusion, and hence the Court can interfere under reference. The documents relied on by the assessees before the Tribunal were mere letters addressed by Y.R.Srinivasan, who is the architect. The said architect had given a quotation and bill dated 27.06.1988 and his acknowledgement of the receipt of a sum of Rs.75,000/- from each of these two assessees, which are not sufficient to prove that there were construction of residential houses. The said documents and other evidences were produced first time before the Income Tax Appellate Tribunal. But the Revenue had relied on Inspection Report and also verified with the Madras Corporation and further they have taken photographs of the place and all these documents reveal that there were only an extension of old building. Further the learned counsel submitted that Section 54F is a beneficial provision and the same should be construed liberally. For the purpose of exemption under Section 54F, the assessees must construct residential houses within three years from the date of transfer. The question here is whether the assessees constructed residential houses or not. In this case, there is no proof for the construction of the same and hence the assessees are not entitled to relief under Section 54F of the Act. The argument that construing the provision liberally does not arise here when we are concerned with the factual issue. The learned counsel for the assessees relied on a number of judgments to support his arguments and they are as under:

a) Supreme Court judgment reported in 120 ITR 46 in the case of Commissioner of Income-tax Vs. T.N.Aravinda Reddy.
b) Calcutta High Court judgment reported in 132 ITR 150 in the case of B.B.Sarkar Vs. Commissioner of Income-tax, West Bengal-IV.

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c) Delhi High Court judgment reported in 132 ITR 661 in the case of Addl. Commissioner of Income-tax, Delhi- II Vs. Vidya Prakash Talwar.
d) Madras High Court judgment reported in 181 ITR 101 in the case of Commissioner of Income-tax Vs. P.V.Narasimhan.
e) Karnataka High Court judgment reported in 165 ITR 571, in the case of Commissioner of Income-tax Vs. J.R.Subramanya Bhat.
f) Supreme Court judgment reported in 53 ITR 574 in the case of Commissioner of Income-tax (Central), Calcutta Vs. Daulatram Rawatmull.
g) Supreme Court judgment reported in 254 ITR 216 in the case of J.J.Enterprises Vs. Commissioner of Income-tax.
h) Allahabad High Court judgment reported in 202 ITR 728 in the case of Commissioner of Income-tax Vs. Cupro Industrial Corporation.
We have gone through the above judgments and they are not relevant to the facts of this case and hence we are not dealing with the same.

6. In the foregoing reasons, we are of the opinion that there were no construction and the claims made by the assessees for exemption under Section 54F were factually unacceptable. Hence we answer the question in favour of the Revenue and against the assessees. No costs.

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Sd/
Asst.Registrar

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Sub Asst.Registrar

To

1. The Asst Registrar,
Income Tax Appellate Tribunal
Bench 'C' Rajaji Bhavan,
III Floor, Basant Nagar, Chennai 90

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2. The Commissioner of Income Tax (Appeals) V,
Madras 600 034.

3. The Income Tax Officer, City Ward III (4)
Madras 600 006.

4. The Commissioner of Income Tax,
Tamil Nadu, I Madras.

+ 1 cc to Mr.J. Balachander, Advcate SR No.19700

+ 1 cc to Mr. Pushya Sitaraman, Advocate SR No.19647

TEJ(CO)
SR/19.5.2006

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